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No. 306

In the Supreme Court of the United States

OCTOBER TERM, 1962

ROBERT E. WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (II 17–20; Pet. 36–40) [1] is not yet reported. The findings of the district judge sitting as a jury are found at I 493–512.

JURISDICTION

The judgment of the court of appeals (II 16) was entered on July 10, 1962. The petition for a writ of certiorari was filed on August 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was improperly denied leave to impeach one of his own witnesses.

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[1] The record is in two volumes. Volume I contains the indictment and a partial trial transcript. Volume II contains the government's appendix below and the orders, opinion, and judgment of the court of appeals.

[2] The claim that the conspiracy count should be set aside because Lynn testified that he joined through fear presents no

2. Whether various rulings on the admissibility of evidence were proper.

3. Whether there was sufficient evidence to sustain the conviction.

STATEMENT

The petitioner was tried and convicted by a judge sitting without a jury in the Northern District of Ohio on three counts charging the counterfeiting of United States twenty dollar bills and conspiracy to counterfeit (I 1-2, 511). He was sentenced to three years' imprisonment on each count, the sentences to run concurrently (Pet. 35).

Hugh Lynn, petitioner's co-conspirator, testified for the government (I 28–30). Lynn had been arrested in mid-July 1960, after selling some of the counterfeit bills to a Secret Service agent (I 88, 102–106) and had pleaded guilty and been sentenced in October 1960 (I 103–107). Lynn had served 12 years for armed robbery from 1943 until 1955 (I 33, 125), and had previously been convicted of other offenses (I 126). He had committed no offenses after his release in 1955 until the 1960 counterfeiting offense (I 496).

Lynn testified that he was introduced to petitioner by a mutual friend, Joe Drago, at the Happy Days Inn in Youngstown, Ohio (I 30–33, 109–112). Petitioner came to Lynn's home the following evening (I 33–34) and asked Lynn whether he had ever thought of making counterfeit bills on a multilith press which

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issue for review since the concurrent sentences are supported by the verdict on the two other counts (I 1–2, Pet. 35). *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Pinkerton* v. *United States*, 328 U.S. 640, 642, fn. 1.

Lynn had purchased in 1956 (I 35, 116). Lynn replied he had not and that he was not interested (I 35).

Petitioner returned about three nights later, with four men in a car (I 36). He told Lynn that the "deal was already through" and that Lynn was to make the counterfeit bills (I 36–37). When Lynn refused, petitioner said, "Well, you have three nice kids there and a wife." When one of the men got out of the car and came toward the house (I 37), Lynn said, "Don't start any trouble here." Petitioner waved to the man and said, "That is all right. I don't need you," and Lynn agreed to make the bills (I 37–38).

After petitioner had brought Lynn a pamphlet on processing and developing, Lynn told him that the printing machine was in bad condition. Petitioner said he would pick it up the next night and have it re-conditioned (I 39, 41). Petitioner later took the press and returned it four or five days later with some inks and plates (I 41–42). When Lynn told petitioner that he did not know anything about photography, petitioner told him that he had to get his own photographer (I 47). Lynn had a friend, Urban Johnson, who knew a photographer and they took the photographs (I 47–48).[3] In mid-May 1960, petitioner brought Lynn special Victor Bond paper (I 82). Lynn told petitioner that a vacuum frame was necessary to put the negatives on to the plates. Petitioner

[3] Lynn, when arrested, had told the Secret Service that he had made the negatives with a portrait camera (I 100). On the stand, Lynn admitted that this was false (I 104), and said that the original statement was given to shield Johnson (I 142), who was his friend (I 121).

said that if one could not be found locally petitioner would fly to Chicago for one (I 50). Eventually petitioner did bring a vacuum frame (I 50). One evening during the week of the first of June 1960 (I 98), after some experimentation, Lynn completed the plates in petitioner's presence, finishing after midnight (I 66–74). The following night starting at 8:30 or 9:00 p.m., Lynn and petitioner printed the twenty dollar bills (I 81–83). Later they cut them and aged the bills by dipping them in a coffee solution (I 83–84). After they were dry, petitioner gathered up an estimated $65,000 worth and placed them in a duffel bag. He left at about six o'clock in the morning (I 83–87).* On cross-examination, Lynn stated this was all done under the threat to his wife and children (I 101, 133–134).

A woman who worked at Addressograph-Multigraph in Youngstown identified petitioner as one of two men who brought in a press to be repaired in May 1960 (I 3–7). Petitioner told her it was for Peerless Siding and he wanted it as soon as possible (I 8). The Service Manager for Addressograph-Multigraph identified the machine as the one he repaired. He testified that he tried to contact a Mr. Hart or Peerless Siding at the Hotel Warner to obtain some information on the press but was unable to reach them (II 1–5). The records of the Hotel Warner at Warren, Ohio, indicated that a Norman Hart and George Scanlon had registered at the hotel on May 18, 1960 (II 5–6). The desk clerk at the hotel identified

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*$10,000 worth were given to Johnson, Lynn sold some to the Secret Service, and the rest were confiscated (I 88).

petitioner as one of the two men, but could not tell which one (II 10–11). The manager of a store in Chicago identified the vacuum frame which was used in the counterfeiting operation as the one he sold to a Mr. J. Scanlon on June 1, 1960, in Chicago. He could not positively identify the purchaser (II 11–13). Petitioner was also identified as the person who, on May 18, 1960, had bought Victor Bond paper, directing delivery to his "brother," George Scanlon, at the Warner Hotel in Warren, Ohio (II 7–9).

Petitioner took the stand in his own behalf (I 303). He said he had been a policeman for the Cleveland Police Department from August 1, 1950, until November 1, 1956, during which time he was injured in a fight and had received back injuries when he was struck by a bus (I 305–314). He testified that he had worked at the Coral Bar in Cleveland since January 1, 1958, excepting, however, the period from June or July 1959 until the first week in June 1960 (I 318). While night manager at the Coral Bar, he worked until after closing at 3:30 in the morning (I 318–319).

Petitioner testified that in the spring of 1960 he had lent two of his trucks (left over from a business which had closed down), one to Charles Gamblin, and the other to his younger brother, Rupert Walsh, to help them repay $3,000 in "overcharges" on a repair job, because if they returned the money they would not be prosecuted. Petitioner's visits to the Warner Hotel in Warren, Ohio, were to check on Gamblin's progress (I 321–324). Gamblin told him not to worry as "he had a deal going" and took peti-

tioner to meet Lynn in a parking lot in Youngstown (I 325). Lynn explained they were going to print race track tickets in advance and then go to a race track, buy one mutual ticket, return to the car, overprint the proper code and winning numbers on the prepared tickets, and cash them (I 326–327). Petitioner said he declined to join in the operation (I 327). In April, petitioner accompanied Gamblin when Gamblin took a press to be repaired to the Addressograph-Multigraph in Youngstown (I 328–331). He registered at the Warner Hotel in Warren, Ohio, using the assumed name "Hart" because "In the home improvement business, in a strange town, the boss is usually called 'Mr. Hart' on the job" (I 333). Gamblin used the name Scanlon (I 333–334). Petitioner also admitted that he ordered paper from the Union Twine & Paper Company in Cleveland in April or May 1960 (I 334), and told them to deliver the paper to George Scanlon at the Warner Hotel, in Warren, Ohio (I 335–336).

During the first few days in June, petitioner again asked Gamblin for money and Gamblin told him he had "something real good going" (I 338–339). When petitioner expressed disbelief, he, Gamblin, and a Terry Hogan, who worked with petitioner, drove to Youngstown and saw Hugh Lynn (I 338–341). Petitioner testified that when he saw the money and negatives, he became enraged, tore up some of the bills, knocked down both Gamblin and Lynn, knocked over the press, struck Mrs. Lynn with his backhand, and left with Hogan (I 342–344). Terrance J.

Hogan, who was employed by petitioner, corroborated petitioner's version of the incident (I 159–177).

Petitioner testified he did not report the matter to the Secret Service or anyone else because (I 463): "Well, I felt at this time, after being in there, and knowing that area, that the best thing for me to do is to mind my own business. I knew that eventually they would be arrested. * * * Because I have never known anybody to get away with counterfeit money." Petitioner also explained that, although he "expected the Secret Service to come to me and talk to me about it, knowing that Gamblin had been associated with me," he did not go to them first because, "Well, I just felt that I—best thing I could do was to mind my own business" (I 464). * * * "Well, I was in an embarrassing position; that I had been with Gamblin at the paper store" (I 466).

ARGUMENT

1. In defense petitioner called as a witness, Mrs. Shirley Ann Lynn, wife of Hugh Lynn. The following occurred (I 290–291):

> Q Would you tell the Court, please, how many times, if any, Mr. Walsh has been at your house?
>
> A He has been at the house several times. He was the man that came to the house and threatened my husband to make counterfeit money.
>
> Q Mrs. Lynn, isn't it a fact that on March 21st, 1961,——
>
> Mr. GRIFFIN: Objection.
>
> Q —in a conversation with Mr. Walsh, in the presence of Mr. Victor Walsh, Mr. Walsh's uncle, you stated that the truth was that Mr.

Walsh had only been to your house once, and that a fight had ensued?

Mr. GRIFFIN: Objection.

A I had not stated that.

Petitioner's counsel then explained to the court that prior to calling Mrs. Lynn as a witness, counsel had told Mrs. Lynn that he had been advised that she had represented to petitioner, in the presence of a Victor Walsh, that petitioner had been to her house only once. Counsel also claimed to have told Mrs. Lynn that all she was concerned with was the truth (I 291-292). On this, counsel claimed the right to cross-examine her and the court said: "She denies what you have said. What is there to impeach?" (I 291). Counsel then made an offer of proof which the court directed government counsel to check (I 292).[5]

The witness testified that petitioner and his uncle offered her $10,000 to say that petitioner had nothing to do "with that" (I 299). There was further cross-examination as to telephone conversations with the uncle (I 299–301), at which point the judge said he was confused and that counsel was having difficulty because "* * * you try to tell her what to say" (I 301). After a bench conference, off the record, counsel stated he had no further questions (I 301).

[5] Out of the presence of the court counsel dictated an offer of proof that if he were allowed to cross-examine the witness she would testify that petitioner had been to her house only once; that she demanded $10,000 to tell the truth, and that they had a meeting and several phone calls concerning this payment (I 292–295). Government counsel reported that the witness said she did meet with petitioner and his uncle at petitioner's request, but denied making the statements attributed to her (I 295–296).

On these facts the contention (Pet. 19–25) that petitioner should have been allowed to impeach his own witness is untenable. There was no basis for a claim of surprise, for, although petitioner's counsel stated that he spoke to the witness prior to placing her on the stand, he did not indicate that she had said how she would testify. As it turned out, the witness expressly denied having said petitioner had been to her house only once and also denied having mentioned the sum of $10,000 to petitioner (I 290–291, 298). Though disappointing, this testimony gave petitioner no cause to complain. His real complaint is not that he was prevented from discrediting his own witness but, rather, that he was stopped before he could force Mrs. Lynn to change her testimony. But it is settled that one cannot place a witness on the stand and, under the guise of impeachment, obtain affirmative substantive evidence. See *Bridges* v. *Wixon*, 326 U.S. 135, 151–154; *Hickory* v. *United States*, 151 U.S. 303, 309; *Tripp* v. *United States*, 295 F. 2d 418, 424–425 (C.A. 10); *Cox* v. *United States*, 284 F. 2d 704, 708 (C.A. 8).

2. Petitioner makes other miscellaneous claims of error relating to the exclusion of certain testimony (Pet. 25–30). None, in context, have any merit.

a. Petitioner testified that he worked at the Coral Bar during the first week of June and that the closing time was 3:30 a.m. (I 318–319). He offered to show that he had a number of tasks to perform after 3:30 a.m. (I 320–321). The trial court refused petitioner's testimony on this point and declined to hear Dan Goldstein, the bar owner, as to the usual procedure after

3:30 a.m. (I 268). Petitioner now says proof of these duties would have negated his participation in the printing of the counterfeit money during the night, as testified to by Lynn (Pet. 26-28).

The proof was irrelevant. Lynn testified that he was not sure of the date of the counterfeiting activities but thought it was "within the week of the 1st of June" (I. 98). According to the payroll records, petitioner did not begin work until June 5, 1960 (I 258). Even if the week of June 5 was relevant, Goldstein admittedly did not tend bar the first two weeks in June (I 270).[6] There was no proof that Goldstein saw petitioner or talked to him at or after 3:30 a.m. on any of these nights.[7] Consequently, the "usual" procedure was not proof that petitioner was not at Lynn's home. Certainly the petitioner's own explanation could rise no higher than his general denial of participation in the counterfeiting.

b. Petitioner complains that the trial court improperly rejected proferred testimony by himself and his uncle, allegedly corroborated by tape recordings, as to Mrs. Lynn's alleged demand for $10,000 to testify in accordance with petitioner's version of the events. The testimony was properly excluded as incompetent and irrelevant. It did not bear on

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[6] Significantly, the defense tendered no employee or other person physically present at the bar at night during the crucial period.

[7] Petitioner suggests that Goldstein's testimony that he spoke to petitioner over the telephone every evening (Pet. 27) would serve the same purpose. But this would hardly show knowledge of petitioner's presence at the bar on any specific night after 12 o'clock (See I 275).

whether petitioner and Mr. Lynn did or did not make counterfeit money. At best, it was part of petitioner's attempt to impeach his own witness, which could, in no event, help his defense.

3. The sufficiency of the evidence presents no issue warranting review by this Court. Lynn's testimony, although that of an accomplice, was sufficient to support the conviction. *United States* v. *Vita*, 294 F. 2d 524, 526 (C.A. 2), certiorari denied, 369 U.S. 823; *Marcella* v. *United States*, 285 F. 2d 322, 323, 324 (C.A. 9), certiorari denied, 366 U.S. 911; *Nichols* v. *United States*, 276 F. 2d 147, 148 (C.A. 6), certiorari denied, 364 U.S. 815. Moreover, it did not stand alone. Lynn's account was corroborated by disinterested testimony of petitioner's participation in the preliminary purchases of paper and in repair of the press. Petitioner's attempted explanation is unconvincing on the record and could properly be rejected by the trier of fact who saw petitioner on the stand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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